

1 STEVEN G. KALAR  
Federal Public Defender  
2 NED SMOCK  
Assistant Federal Public Defender  
3 555 - 12th Street  
Suite 650  
4 Oakland, CA 94607-3627  
Telephone: (510) 637-3500  
5  
Counsel for Defendant Tuan LUONG  
6  
7

8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10

11 UNITED STATES OF AMERICA,	)	No. CR-15-00178 HSG
	)	
12 Plaintiff,	)	MOTION, NOTICE OF MOTION AND
	)	MEMORANDUM IN SUPPORT OF
13 vs.	)	MOTION TO SUPPRESS EVIDENCE
	)	
14 TUAN NGOC LUONG,	)	Date: August 10, 2015
	)	Time: 2:00 p.m.
15 Defendant.	)	Courtroom: Hon. Haywood S. Gilliam
	)	

---

16  
17 TO: UNITED STATES OF AMERICA, PLAINTIFF; AND MELINDA HAAG, UNITED  
18 STATES ATTORNEY; AND BRIAN LEWIS, ASSISTANT UNITED STATES  
ATTORNEY

19 PLEASE TAKE NOTICE that defendant Tuan Ngoc Luong moves this Court for an order  
20 suppressing statements attributed to him at the time of his arrest and evidence obtained from a  
21 cellular telephone seized at the time of his arrest.

22 The motion is based on this notice and motion, the following memorandum of points and  
23 authorities and accompanying exhibits, the Fourth and Fifth Amendments to the United States  
24 Constitution, all other applicable constitutional, statutory and case authority and such evidence  
25 and argument as may be presented at the hearing of this motion.  
26

## 1

2

7

## 11

12

25

1 of his arrest. Alameda County Judge Jacob Blea III signed the warrant authorizing a search for:

2 (1) Recent call history of all outgoing, incoming, missed calls and lists of all contacts  
3 stored inside of Almonte's cellular phone.

4 (2) All incoming and outgoing text messages, picture messages, pictures and video's  
5 stored inside of Almonte's cellular phone.

6 Search warrant, attached as Exhibit B to Smock Decl.<sup>1</sup> The defense has received limited  
7 discovery about the results of the search of the cellular telephone.<sup>2</sup> However, the government  
8 produced to the defense screen shots taken from what appears to be the cellular phone linked to  
9 Mr. Luong. Those screen shots show text message exchanges, but also show what appear to be  
10 screen shots of internet history on the cellular phone. Specifically, there are screen shots of a  
11 Craigslist post advertising an automobile for sale. Screenshots, attached as Exhibit C to Smock  
12 Decl.

## 12 ARGUMENT

### 13 A. The statement obtained as a result of pre-Miranda questioning must be suppressed

14 The government claims that at the time he was being placed under arrest, Mr. Luong told  
15 Alameda County Sheriff's Deputies that he possessed the charged handgun for protection. This  
16 statement must be excluded because it was obtained in violation of *Miranda*.

17 The Supreme Court held in *Miranda* that police must advise suspects of certain rights  
18 before interrogating a suspect in custody. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

19 "[C]ustodial interrogation' mean[s] 'questioning initiated by law enforcement officers after a  
20 person has been taken into custody or otherwise deprived of his freedom of action in any  
21 significant way.'" *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (quoting *Miranda*, 384

---

23 <sup>1</sup>The warrant here erroneously refers to "Almonte's cellular phone". Because the  
24 narrative statement of probable cause refers to Mr. Luong, this appears to be a typo. The defense  
25 does not here challenge the warrant on this basis.

26 <sup>2</sup>The defense's demand for further discovery on this issue is the subject of a concurrently  
filed motion for discovery.

1 U.S. at 458). In considering whether a person is in custody, courts must look at “how a  
2 reasonable person in the suspect's situation would perceive his circumstances.” *Id.* at 662.  
3 Statements that are the product of custodial interrogation must be suppressed unless the  
4 defendant first was advised of and validly waived his rights. *Miranda*, 384 U.S. at 444.

5 Mr. Luong was in custody for purposes of *Miranda* because at the relevant time he had  
6 been ordered out of his car and onto the ground at gunpoint. He was lying on the ground and a  
7 deputy was on top of him when the deputy asked him why he had a gun. Luong Decl., ¶3.<sup>3</sup> The  
8 test for what constitutes custodial interrogation is whether the words or actions of the police  
9 officers were such that they should have known that those words or actions were likely to elicit  
10 an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301-02 (1980). It should go  
11 without saying that the deputy’s question about why Mr. Luong had a gun amounted to custodial  
12 interrogation. *See United States v. Moreno-Flores*, 33 F.3d 1164, 1169 (9th Cir. 1994) (stating  
13 that interrogation for purposes of *Miranda* includes “any words or actions on the part of the  
14 police (other than those normally attendant to arrest and custody) that the police should know are  
15 reasonably likely to elicit an incriminating response.”). Mr. Luong was not advised of his  
16 *Miranda* rights before the deputy interrogated him. Therefore, the Court must suppress all  
17 statements that he made before he was warned because they were obtained in violation of  
18 *Miranda*. *See United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir.1990) (stating  
19 that a *Miranda* violation occurs when a suspect is interrogated while in custody without first  
20 being advised of his rights).

21 //

22 //

23 //

24 \_\_\_\_\_

25 <sup>3</sup>Officer McKaig describes Mr. Luong’s statement as “spontaneous.” McKaig report. It  
26 is not clear whether he denies asking Mr. Luong about the gun. To the extent there is any dispute  
about the relevant facts, the defense requests an evidentiary hearing.

1 **B. Any evidence obtained from the cellular phone that was outside the scope of the**  
2 **search warrant must be suppressed**

3 “It is fundamental, of course, that a search must be confined to the terms and limitations  
4 of the warrant.” *United States v. Washington*, 797 F.2d 1461, 1468 (9th Cir. 1986). As set forth  
5 above, the warrant signed by Judge Blea did not grant permission to search the entire contents of  
6 the cellular phone. The warrant authorized only a search of recent call history, contacts, text  
7 messages, picture messages, pictures, and videos. Based on the discovery provided thus far, it  
8 appears that law enforcement accessed the internet history of the cellular phone in order to obtain  
9 screen shots of a Craigslist posting. This suggests that law enforcement searched the cellular  
10 telephone beyond what was permitted in the warrant. Accordingly, all such evidence must be  
11 suppressed.

12 **CONCLUSION**

13 For the reasons stated above, Mr. Luong respectfully asks the Court to suppress all fruits  
14 of the pre-Miranda questioning and all evidence obtained from the cellular telephone that was  
15 outside the scope of the February 19, 2015 search warrant.

16 Dated: July 6, 2015

17 Respectfully submitted,

18 STEVEN G. KALAR  
Federal Public Defender

19 /s/ Ned Smock

20 NED SMOCK  
Assistant Federal Public Defender  
21  
22  
23  
24  
25  
26